1991

State of Utah v. Maximillian Roberto Seale : Reply Brief

Utah Supreme Court

R. Paul Van Dam; Attorney General; Annina M. Mitchell; Assistant Attorney General.
Gary W. Pendleton; Attorney for Defendant.

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	)	
Plaintiff and Appellee,	)	Case No. 910010
vs.	)	
MAXIMILLIAN ROBERTO SEALE,	)	Priority No. 2
Defendant and Appellant.	)	

REPLY BRIEF

THIS IS AN APPEAL FROM A DENIAL OF A MOTION FOR NEW TRIAL AND FROM JUDGMENTS ON JURY VERDICTS FINDING DEFENDANT GUILTY OF ONE COUNT OF RAPE OF A CHILD, A FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. §76-5-402.1 (1990), AND SIX COUNTS OF AGGRAVATED SEXUAL ABUSE OF A CHILD, FIRST DEGREE FELONIES, IN VIOLATION OF UTAH CODE ANN. §76-5-404.1 (1990) IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR WASHINGTON COUNTY, STATE OF UTAH, THE HONORABLE J. PHILIP EVES, PRESIDING.

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TABLE OF AUTHORITIES

No additional authorities are presented in this Reply Brief.

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REPLY BRIEF

SUMMARY OF ARGUMENT

Defendant's contemporaneous objection to the admission of the alleged victims' videotaped statements specifically raised the constitutional issue of right of confrontation and that issue has been properly preserved for appellate review.

Further, Defendant's hearsay objection to the admission of statements allegedly made to Elizabeth Jones was specific and contemporaneous and that issue has likewise been preserved for appellate review.

ARGUMENT

POINT I

DEFENDANT ADEQUATELY PRESERVED A CONFRONTATION CHALLENGE TO THE ADMISSION OF THE VIDEOTAPED STATEMENTS.

In Point II of its brief, the State argues that the Defendant did not make a

specific, contemporaneous objection which adequately raised, in the trial court, the Defendant's contention that the admission of the videotaped statements would deny him the right of confrontation.

The State contends:

> Defendant's resistance at trial to the admission of the videotape was based solely on his view that the statement did not meet the statutory and rule requirement of reliability and trustworthiness [citations omitted]. If defendant had raised at trial the specific confrontation issue from Wright that he now raises on appeal, he would have given Judge Eves the chance to avoid a potential constitutional error that could result in reversal.

Appellee's Brief at p. 30.

In making his objection to the admission of the videotape, trial counsel stated:

> [BY MR. WINCHESTER] The interest of justice, in my opinion, would require this court to look at the reliability of the tape and weigh that against a defendant's constitutional right under both the United States Constitution and our state constitution to be able to cross-examine witnesses.
>
> I can't cross-examine that videotape. I can't cross-examine the statements made therein. And as the court has now seen I think it would be futile to try to cross-examine [P.W.].
>
> * * *
>
> That's the very predicament which Mr. Seale finds himself. If this court allows the tape to come in, he has no way of cross-examining the statements made on that tape. And I believe he's denied his constitutional right to face his witness -- to face the accused and to cross-examine the witness.

T 105-106.

The trial court clearly understood the objection to have constitutional

dimensions including questions regarding the right of confrontation.

> [BY THE COURT] This is a troubling portion of our law. As you know, the statute is relatively new. The concept is sort of revolutionary. The idea that a defendant can be faced with conviction by a videotape and never have the opportunity to cross-examine the declarant in the videotape is a concept that although it's embodied in the statute still has to test the -- or still has to fact the test of constitutionality.

T 111.

The State's contention that the Defendant failed to adequately raise the constitutional issue at the trial level is without merit.

POINT II

DEFENDANT'S OBJECTION TO THE ADMISSION OF THE ALLEGED VICTIMS' PRIOR STATEMENTS MADE TO ELIZABETH JONES WAS SPECIFIC AND THE ISSUE HAS BEEN PROPERLY PRESERVED FOR APPELLATE REVIEW.

When the prosecutor attempted to elicit testimony regarding out-of-court statements which J.W. and P.W. had allegedly made to Elizabeth Jones, defense counsel objected:

> [BY MR. WINCHESTER] Your honor, I'll object to statements made by the children on the same basis as the objection yesterday that regarded the social worker from Idaho.

T 176.

On the preceding day, the prosecutor had attempted to elicit a hearsay statement from Mary Riggs, a social worker from Jerome, Idaho. Defense counsel specifically stated his objection: "Objection, your honor. I believe the response will be hearsay." (T 117)

The trial court obviously understood the objection to Elizabeth Jones' testimony to be hearsay for in overruling the objection the court did so on the basis that the statements were "admissible as prior consistent statement, and therefore, it would be admissible for the truth of the matter asserted, the credibility of the victims having been questioned." (T 176) It cannot reasonably be argued that the trial court misunderstood the objection.

"Hearsay" is not a "generic objection" as the State suggests. "Hearsay" is a specific objection. It draws the trial court's attention to the contention that the pending response will include out-of-court statements which the proponent offers in evidence to prove the truth of the matter asserted. Trial counsel is not obliged to identify each exception to the rule against hearsay or argue its inapplicability.

The State's contention that trial counsel did not adequately identify the nature of Defendant's objection is without merit.

The State further contends that any error arising out of the admission of Elizabeth Jones' testimony was harmless and in footnote 18 on page 48 of the Appellee's Brief, the State argues:

> In light of the evidence at trial, including the testimony of J.W. and the videotaped statement of P. W. and the unchallenged but similar prior statements to Dr. Sugden and their Aunt Cheryl in Idaho, defendant could not make the requisite showing that the alleged evidentiary error in admitting the statements to Elizabeth was harmful.

In making this argument, the State overlooks several important facts. First, the statements made to Dr. Sugden and Cheryl Vanleishout were not spontaneous and were far removed in time from the statements allegedly made to Elizabeth Jones.

Second, the statements made to Dr. Sugden were made during the investigative stage of the proceedings and in no way relate to any offense allegedly committed against P.W. Finally, the statements allegedly made to Cheryl Vanleishout were not admitted to prove the truth of the matter asserted. In admitting this evidence the court instructed the jury:

> [BY THE COURT] Ladies and gentlemen of the jury, I am going to allow the statement to stand and overrule the objection. But you need to understand that the statements that are being given now by this witness and which are being attributed to [J.W.] are not being introduced for the truth of the content of those statements. In other words, not to prove that what [J.W.] said was true, but rather to demonstrate that a complaint was made and the circumstances under which the complaint was made.

T 138-139.

The prejudice associated with the admission of statements allegedly made to Elizabeth Jones is manifest. First, the statement was admitted as a prior consistent statement of P.W. notwithstanding the fact that, at that point in the proceedings, P.W.'s videotaped statement had not been admitted into evidence and P.W. had made no in-court accusation against the Defendant.

Second, relating to J.W., the statement was admitted, not to rebut an express or an implied charge of recent fabrication or improper influence or motive, but to reinforce J.W.'s testimony in light of mere contradiction provided through the testimony of one of the state's own witnesses, Alice Chapman.

CONCLUSION

The State's contentions that the Defendant failed to make specific and contemporaneous objections which preserved the constitutional and hearsay issues for

appellate review are without merit.

DATED this 8 day of July, 1991.

/S/
Gary W. Pendleton
Attorney for Defendant and Appellant

MAILING CERTIFICATE

I do hereby certify that on this 8 day of July, 1991, I did personally mail four true and correct copies of the above and foregoing Notice to: R. Paul Van Dam, Attorney General, at 236 State Capitol, Salt Lake City, Utah 84114.

/S/
Gary W. Pendleton